No. 86-1333

In The

Supreme Court of the United States

October Term, 1986

NATIONAL ELEVATOR INDUSTRY, INC.,

Petitioner,

vs.

INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

National Elevator Industry, Inc. ("NEII") hereby submits its reply brief to the brief in opposition of International Union of Elevator Constructors ("IUEC"), pursuant to Rule 22.5 of the Supreme Court rules.

I.

Contrary to the IUEC's Argument, the Result of the Rearbitration of the Disputed Wage Claim Was a Finding Which Directly Conflicts With the Judgment of the District Court for the Southern District of New York.

In NEII's principal brief, NEII argues that the Fifth Circuit's affirmance of Judge DeAnda's order compelling NEII to rearbitrate the same issue which was decided by Arbitrator Goldberg, allows the IUEC to mount an impermissible collateral attack upon the judgment entered by Judge Goettel that Arbitrator Goldberg's award draws its essence from the collective bargaining agreement.

In its brief, the IUEC argues that the IUEC is not attempting to collaterally attack Arbitrator Goldberg's award or the judgment of the District Court for the Southern District of New York confirming that award. Contrary to the IUEC's argument, that is precisely what the IUEC is attempting.

Arbitrator LeBaron expressly held that he was not obligated to follow Arbitrator Goldberg's award because, in Arbitrator LeBaron's view, Arbitrator Goldberg's award does "not draw its essence from the collective bargaining agreement." This holding is diametrically opposed to Judge Goettel's finding that the Goldberg award does draw its essence from the collective bargaining agreement. Thus, notwithstanding the IUEC's claim that it is not seeking to collaterally attack the Goldberg award or the judgment affirming that award, the fact is that the entire proceedings before Judge DeAnda, the Fifth Circuit and Arbitrator LeBaron culminated in an express and flat contradiction of the ultimate finding in Judge Goettel's opinion, the very finding that Judge Goettel was obligated to make pursuant to the decision of this Court in the *Steelworkers'* trilogy, *Steelworkers v. American*

Mfg. Co., 360 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

II.

Contrary to the IUEC's Argument, the Judgment of the District Court for the Southern District of New York Did More Than Confirm Arbitrator Goldberg's Award; It Also Dismissed the IUEC's Plenary Action on its Contractual Claim.

The IUEC's complaint in the Southern District of New York sets forth a contractual claim against NEII under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. (*See* Appendix 43a.) The IUEC's contractual claim was a claim that wage rate reductions violate the collective bargaining agreement. This claim was asserted in a plenary action in which the IUEC sought to have Judge Goettel decide the contractual claim, as distinguished from the IUEC's additional motion to vacate the Goldberg award. The IUEC's contractual claim is alleged in paragraph 13 of the IUEC's complaint, which reads as follows:

> The action of NEII and its member companies in unilaterally implementing the wage cuts over the IUEC's objection is in violation of Article V of the Standard Agreement, which does not permit a unilateral change in a wage rate by an employer.

Appendix at 47a.

Judge Goettel dismissed the IUEC's complaint. Judge Goettel did so because Judge Goettel confirmed Arbitrator Goldberg's award holding that wage rate reductions are permitted under the collective bargaining agreement. Arbitrator Goldberg's interpretation of the collective bargaining agreement thus became

the basis for a judgment of the District Court in a plenary action brought by the IUEC, a judgment which should be accorded preclusive effect as to all issues actually decided by the District Court.

In effect, the IUEC now argues to the Supreme Court that the District Court's judgment should not be accorded the deference which is accorded other judgments merely because the District Court's judgment was based upon an arbitrator's interpretation of a collective bargaining agreement. This is an attack upon the concept of issue preclusion itself: it requires a review of the legal sufficiency of the judgment, a function already performed by the Second Circuit's affirmance of the judgment.

The IUEC further argues that in the litigation in New York, the IUEC sought an objective which was virtually impossible to obtain, that Judge Goettel could have sustained the IUEC's complaint only if Judge Goettel were to rule that no arbitrator could properly conclude that the collective bargaining agreement permits a wage reduction (IUEC's Brief at 8). Assuming *arguendo* that the statement is correct, this argument is also an attack upon the concept of issue preclusion itself. In essence, it is an argument that a judgment dismissing a farfetched claim should be accorded less weight than a judgment dismissing a colorable claim.

III.

The IUEC Errs in its Interpretation of the *West Gulf Maritime* Litigation.

The decision of the Fifth Circuit in the instant action is in conflict with the decisions of the Fourth and Eleventh Circuits in *S.C. Stevedores Ass'n v. Local 1422, ILA*, 765 F.2d 422 (4th Cir. 1985) and *S.E.L. Maduro Inc. v. ILA*, 765 F.2d 1057 (11th Cir. 1985).

Indeed, as will be demonstrated below, the decision of the Fifth Circuit is also in conflict with the decision of the Second Circuit which gave rise to the decisions of the Fourth and Eleventh Circuits. *See ILA v. West Gulf Maritime Ass'n,* 594 F. Supp. 670 (S.D.N.Y. 1984), *later opinion,* 605 F. Supp. 723 (S.D.N.Y. 1985), *aff'd,* 765 F.2d 135 (1985).

The IUEC seeks to distinguish these cases by asserting that in the *West Gulf Maritime* litigation there was an express finding as to the scope of the award. Actually, the District Court in *West Gulf Maritime* ruled not on the scope of the award but on the issue of who would be bound by the arbitration award. The District Court stated:

> The situation is an unusual one. WGMA was, indeed, the only party named in the grievance. The grievance in question, however, was whether a particular practice was governed by the containerization provisions of the Master Contract. Since all signatories to that contract are bound by its terms, and since resolution of disputes relating to those terms have been entrusted to the EHP, the EHP's vote on the June 12th resolution necessarily affected all signatories to the Master Contract and not simply the party against whom the original grievance was filed.

Id., 605 F. Supp. at 728 (footnote omitted).

The District Court joined the other trade associations who were signatories to the ILA Master Contract as parties to the litigation and confirmed the award against all such signatories. *Id.*

In affirming, the Second Circuit stated:

> [T]he award purported to be a decision based on the Master Contract. All of the respondents are parties to the Master Contract. Thus, the EHP decision, if valid, would be binding against all of the respondents. The district court did not err in confirming the award against them. The decisions of the EHP is binding on all ports governed by the Master Contract.

ILA v. West Gulf Maritime Ass'n, supra, unpublished slip op. at p. 3.

The Second Circuit held that where an award is issued under a nationwide collective bargaining agreement and confirmed against all parties to that agreement, it is binding against all parties wheresoever the contract applies. Thus, the decision did not turn on the basis of any peculiarity in the ILA Master Contract but on the identity of the parties to the agreement, and the identity of the parties to the litigation wherein the award was confirmed.

In *S.C. Stevedores* and *S.E.L. Maduro* cases, where the losing parties in the *West Gulf Maritime* litigation were seeking rearbitration of the same issue, the Fourth and Eleventh Circuits accorded preclusive effect to the judicially confirmed award because the parties before the Fourth and Eleventh Circuits had been parties to the litigation in New York and were bound by the judgment rendered against them in that litigation. *S.C. Stevedores Ass'n v. Local 1432, ILA, supra; S.E.L. Maduro (Fla.) Inc. v. ILA, supra.*

In the instant case the only signatories to the Standard Agreement are NEII and the IUEC (31a-32a). The IUEC signs the Standard Agreement for and on behalf of each of its affiliated local unions (31a-32a). The only parties to the litigation before Judge Goettel and the Second Circuit were NEII and the IUEC.

The only parties to the litigation before Judge DeAnda and the Fifth Circuit were NEII and the IUEC.[1] Accordingly, the very same identity of issues and parties relied upon by the Second, Fourth and Eleventh Circuits in confirming the award against the various shipping associations regardless of location are present in the instant case. NEII submits that the Fifth Circuit erred in not according preclusive effect to the judicially confirmed Goldberg award.

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1. Locals 21 and 31 of the IUEC sought to intervene in the litigation before Judge DeAnda. Judge DeAnda denied the motion to intervene (10a-12a, 13a). *See also, National Elevator Industry, Inc. v. Local 5, International Union of Elevator Constructors,* 426 F. Supp. 343, 349-350 (E.D. Pa. 1977).

CONCLUSION

NEII respectfully requests that this Court grant its petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit so as to address the important issue of the preclusive effect of a judicially confirmed arbitration award on a subsequent attempt to submit the same dispute to arbitration and, thereby, resolve the conflict among the Circuits on that issue.

Dated: New York, New York
April 14, 1987

Respectfully submitted,

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